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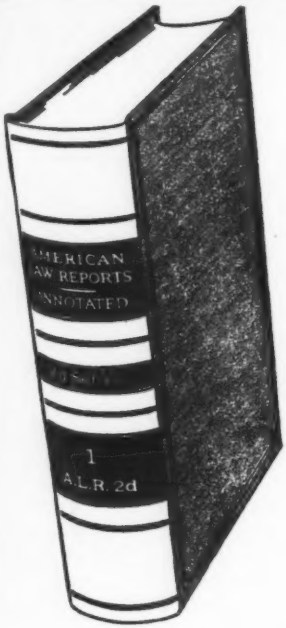

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The Role of the Lawyer In Time of Crisis

By SOL M. LINOWITZ
of the Rochester, New York Bar

Condensed from a speech before the Second Annual Convention, Second Circuit, of the American Law Students Association at Cornell Law School, April 14, 1951

WE are today confronted with a crisis of unparalleled proportions. The peril permeates the entire fabric of our national life. And never before in history has the legal profession been faced with a greater challenge and opportunity than at this moment. The way the lawyers of the nation measure up to that challenge and that opportunity may well determine not only the future of the legal profession, but to a large extent the future of our democratic traditions and of our Constitutional form of government.

It is undeniable that in the public mind the lawyer has lost much of the respect and esteem that in the past have characterized his calling. Books, magazines, radio and television have in recent years vied with one another in presenting lawyers as a heterogeneous assortment of caricatures held together by a common pursuit of ambulances. If the lawyer is to fulfill his true function in this time of crisis, he must assume once more the role in which he was originally cast—the protector of freedom and individual liberty.

There are today about 180,000 lawyers in the United States. This contrasts with 150,000 clergymen, 190,000 doctors, and approximately 76,000 college presidents and professors. What is the true function of these 180,000 lawyers? There are, I submit, two separate aspects which must be separately viewed and separately understood.

In the first place, the lawyer is a professional man charged with the obligation of advising and acting for private clients in connection with their legal affairs. As a consultant and private adviser, the lawyer has gained an influence far beyond that of the other serving professions in modern business, industry, and finance. With the growth of corporate structures, the expansion of government controls, and the rise of legal and administrative agencies directly affecting business activity, he has come to occupy a strategic position in our economy. As a private adviser the lawyer must be ready to offer guidance and

counsel to his client with a deep awareness of social change, intelligent understanding of business operation, and a complete respect for confidences.

This is the bread and butter aspect of legal practice.

There is, however, another side which assumes, at this grave hour, paramount importance. The lawyer is, above all other groups, equipped to give leadership and guidance in times of great national stress. This country became free under the leadership of its lawyers; our democratic institutions have grown and become strong through the devoted efforts of lawyers. This has given the legal profession its standing as a "democratic aristocracy" designed to serve in the development of enlightened public opinion.

Is the legal profession today discharging this most vital part of its function? Chief Justice Vanderbilt, of New Jersey, recently wrote the tragic answer: "The greatest default of the legal profession today is the lack of sense of individual responsibility on the part of every member of the bar for his position as a leader of public opinion in his own community—be it hamlet or city, county or state, the nation or the world."

Why has this happened? I submit that to a very large extent this has come about because the legal profession has forgotten its heritage and has bartered away its birthright for pottage. The bar has entered the marketplace and has become "tainted with the manners and morals of the marketplace." The measure of professional success has become more and more how much the lawyer earns rather than what he does. In this process the bar has inevitably shunted aside its opportunity and its obligation for public service.

Justice Learned Hand saw the handwriting on the wall when he said: "The profession of the law has its fate in its own hands; it may continue to represent a larger, more varied social will by broader, more comprehensive interpretation. The change must come from within. The profession must satisfy its community by becoming itself satisfied with the community. It must assimilate society before society will assimilate it; it must become organic to remain a living organ. The lawyer must learn to live more capaciously or become content to find himself continuously less trusted, more circumscribed until he becomes hardly more important than a minor administrator, confined to a monotonous round of record and routine, without dignity, inspiration or respect. There can be no ambiguity in the answer of those who are worthy of the traditions and power of a noble calling."

If the bar is to make itself "worthy of the traditions and power of a noble calling," it must

rise at this hour when we are confronted with the challenge of a totalitarian ideology directly opposed to the hard-won principles of freedom for which this nation stands. That freedom, and the power to deal with it have, by the expansion of suffrage, the increase of popular education, and the perfection of modern mass communication, been placed in the hands of plain people. It is, therefore, the man in the street who must clearly understand the meaning of individual freedom and the basic connotations of Constitutional rights. He must know that Constitutional guarantees are safe only in a government of law, not of men. He must understand how rights are granted, how justice is administered, and what makes law and order secure. In addition, he must clearly understand the importance of self-restraint and self-discipline in the preservation of freedom. He must know that rights involve obligations; and that freedom is meaningful only if it encompasses responsibility.

These are the things the lawyer can help make clear. These are the strengths of democracy which the lawyer takes unto himself when he enters the service of justice.

What then, are the challenges before the lawyer at this hour? Faced with a ruthless foe and a grave threat of war, this nation has reacted with hysteria and fear. Horrifying visions of atomic warfare have led many of our citizens (tragically, even some in high places) to discard all hope for peace and anticipate only Armageddon. Because the United Nations, to which we solemnly committed our best efforts, has not on every front been able to oppose aggression with military force, there are those who would impatiently discard the structure, the hope and the commitments. In the disparagement of the United Nations efforts, achievements have been forgotten and past successes totally ignored.

What the lawyer knows, however, is that the UN is an effort to create a world of law; that such a world does not come about overnight, nor without struggle and pain; and that our own history makes all too clear that the welding of nations into unity is a difficult and often bloody process. Above all others, the lawyer knows, too, that bringing about a society of law is worth the cost and that nothing has ever been finally settled by blood-

shed. The legal profession therefore has the duty of making clear to the people the need for patience, devotion and understanding in the development of a world of law. By the same token, to the lawyer who knows that a principle of law has validity even though it is not everywhere enforced, the solemn covenants of the United Nations Charter are real and powerful obligations toward which the world can and must strive. The lawyer must not only understand all this; he must also stand ready to help others understand it.

In our national life, the bar has the equally sacred obligation of preserving inviolate basic Constitutional rights of individual freedom. Our Anglo-Saxon tradition of justice is grounded in fair play, free speech, freedom of thought. When reckless men, therefore, combine Congressional immunity with callous disregard for principles guaranteed by the Bill of Rights, it is the lawyers of the nation who are being challenged and who must speak up. In a society which tolerates destruction of a man's good name or the besmirching of his character or reputation without the opportunity to refute charges made against him, the lawyer sees the frightening shadow of the Inquisition.

Four times in our history we have seen men deprived, out of fear and hysteria, of basic freedoms guaranteed by the Constitution. To overcome the preachments of Tom Jefferson, the Alien and Sedition Acts were passed in 1790, imposing illegal restraints, censorship and gags. In 1850, the South sought to protect the institution of slavery by hysterical resorts to unconstitutional searches and seizures. In 1890, there was an effort to outlaw the Populist Party by depriving its members of the right of free speech. After World War I, a Red scare led to the imprisonment of men like Eugene Debs. Each of these aberrations involved a drastic departure from our democratic traditions and practices. In each case, lawyers—men such as Charles Evans Hughes—were at the forefront of those who condemned the illegal action and denounced it for what it was.

Lawyers today recognize the importance of the Congressional power of investigation and the necessity for Congressional immunity. They have no wish to interfere with the right of Congressional inquiry which the Supreme Court has held to be proper. Lawyers must, however, speak up for the preservation of fair play and actions consistent with our rules of justice. The bar knows that our vaunted principle of free speech is mere hypocrisy if freedom to speak out is, in fact, denied; that the principle of justice and fair hearing with due process of law is nonsense if it can be ignored in the halls of Congress.

As lawyers we know that what has made this nation great is tolerance and a willingness to listen to all sides. It was Jefferson who used these words in his first Inaugural Address: "If there be any among us who would wish to dissolve this union or to challenge its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

A brilliant editorial in the June, 1950 American Bar Journal put it this way: "The price of free speech is that we shall hear unpopular as well as popular truth. If speech is to be free, men must be left free to speak slander and falsehood; free to give vent to malicious and emotional feelings for political and propagandist purposes. In the absence of a clear and present danger, the remedy provided by the law of defamation has in the past been considered adequate. A democracy is based on the assumption that the people are capable, after hearing all sides, of sorting the wheat of truth from the chaff of error. If the test of truth is its ability to get itself accepted in the competition of the marketplace of ideas, truth must expect to be jostled about . . . by defamation, falsehood and propaganda. Truth will be tough enough to survive the jostling.

"Lawyers must be both discerning and courageous enough to stand their ground when that jostling reaches the point where fundamental constitutional liberties are infringed."

Case and Comment Receives Honor Medal

"FOR outstanding achievement in bringing about a better understanding of the American way of life," *Case and Comment* recently received an Honor Medal from Freedoms Foundation. This award, presented at the Foundation's Regional 1950 Award Ceremonies at Columbia University in New York, was made for the publication of David A. Simmons' outstanding article, "Man's One Fundamental Right," in the May-June 1950 issue of *Case and Comment*. For his authorship of this article Mr. Simmons had previously been presented with a similar medal, in addition to a cash award, at the Foundation's main 1950 Award Ceremonies at Valley Forge on Washington's Birthday.

It is with deep regret that we add that David A. Simmons died suddenly, at the untimely age of fifty-three, on March 21, 1951. A past president of the American Judicature Society and of the American Bar Association, he was "a man of matchless courage, unimpeachable integrity, and unshakable loyalty [whose] character was above reproach and [whose] ability as a lawyer was outstanding."

Lawyer Bankruptcies*

By CHARLES O. PORTER

Assistant to the Director of the Survey of the Legal Profession

Reprinted from Journal of the National Association of Referees in Bankruptcy, July, 1950

LAWYERS are human beings. Not all of them succeed in life. Some even go into bankruptcy. How many and under what circumstances are the questions this article answers with respect to the 21-month period, July 1, 1947, through March 31, 1949.

During this period 36,894 bankruptcy proceedings were filed. Of the 220 professional persons (druggists make up 90% of the total) among these bankrupts, 15 were lawyers. Of these 15 lawyers, ten went bankrupt for reasons connected with matters outside the practice of law. They had business interests that failed. Five, however, became bankrupts because their personal obligations were too heavy for the income they were able to obtain from the practice of law. One of the five managed to pay his creditors in full.

If the population of the United States is 150 million and there are 180,000 practicing lawyers, lawyers make up a trifle over one-tenth of one per cent of the total population. However, the four lawyer bankrupts constitute only a little over one-hundredth of one per cent (.01%) of the 36,894 bankrupts who filed in the 21-month period.

Stacked up against other bankrupted professional persons, including, among others, doctors, dentists, and druggists, the four lawyers make up 1.8% of the 220 total.

It should be noted that no law firm went bankrupt in this 21-month period.

All the four bankrupted lawyers were practicing law alone. Two failed in Los Angeles and one each in Detroit and Chicago.

* * * * * * *

Mr. Ayman made $4,900 in 1946 and $3,600 in 1947 from his law practice. He had a wife and child. His $1,964 of debts were offset by no unexempt assets. A breakdown of the debts showed:

loans	759
merchandise	740
medical	340
employment agency	125

*The information in this article was gathered through the co-operation of the clerks of various United States District Courts and Martindale-Hubbell, Inc., and with the assistance of Will Shafroth, Chief of the Division of Procedural Studies and Statistics for the Administrative Office of the United States Courts.

The last item could have been for part-time secretarial help. After going through bankruptcy, he left private practice and got a job in a corporation.

Mr. Beman had spent almost fifty years at the bar and was a graduate of the University of Michigan. Mr. Beman's debts came to $13,384.77, $9,000 of which was his law office's rent 1929–1939. Printing and a newspaper advertisement accounted for $105.00; other rentals for $437.99; a deficiency judgment on a foreclosed mortgage for $1,167.03; medical expenses for $1,287.75; and an estate claim reduced to a judgment for $1,387.00. A direct check-up showed that no professional dishonesty was involved.

Mr. Ceman, according to a local observer, went bankrupt because of "illness and domestic difficulties." He was 53 years old and a member of the bar of two northern states. He had a law degree from a good state university. His net worth in the year he became a bankrupt, according to his own estimate for publication, was $10,000.

The state of Mr. Deman's law practice did not encourage him in the face of $1,723.76 debts. Medical bills incident to an automobile accident amounted to $1,420.00. Other debts were: merchandise, $76.88, and loans, $226.88. His own exempted assets amounted to but $495.00.

* * * * * * *

Ayman and Deman each owed less than $2,000.00. The accident's expenses apparently floored Deman, whereas Ayman gave up the practice of law for a salaried job and wanted to start without the debts that had piled up while he was living on a deficit basis.

Beman's $9,000 rent bill for ten years bespeaks an indulgent landlord who ultimately lost all his rent money. The medical expenses and the deficiency judgment, nearly $3,000 in aggregate, are substantial.

Ceman's "illness and domestic difficulties" are not confined to him or to lawyers. Whether these difficulties preceded or succeeded his inadequate law practice we are in no position to judge.

Lawyers, we repeat, are human beings. Some get sick, some get run over, and some fight with their wives. Some use bankruptcy to wipe out debts amounting to less than $2,000. At least one wiped out ten years of office rent.

However, and this is the point of this article, the number of lawyers taking refuge in bankruptcy is infinitesimal.

This fact, we submit, is not in accordance with the impression a number of persons, including lawyers, have about the legal profession. If many lawyers are slipshod in their business dealings and quick to find a legal way out from under their responsibilities, the evidence does not lie in the bankruptcy records

kept in our federal district courts.

On the contrary, the evidence here plainly demonstrates that practicing lawyers as a group resort to bankruptcy hardly at all.

It is perfectly true that a lawyer cannot, by going through bankruptcy, rid himself of liability for fraudulent conduct or for betraying the trust a client reposes in him.

Yet inasmuch as the facts as to liability are apt to be disputed by the lawyer, the aggrieved client would naturally be inclined to sue the lawyer, prove his case in court, and get an execution for the amount of the verdict plus costs. An execution founded on such a claim would appear in the bankruptcy schedules.

The official record is that during the 21-month period studied there were 36,894 bankruptcies. Of these 220 persons were in the "professional" group. Of the 220 professional persons, 15 were lawyers.

Of the 15 lawyers, 10 were in trouble for causes clearly having nothing to do with the practice of law.

Of the five lawyers (including the lawyer who managed to pay his debts in full) whose debts were connected with their law practice, four owed debts incurred for office expenses such as rent.

None of the lawyer-bankrupts, on the record, was liable for malfeasance or a misappropriation of funds.

What Is a Judge?

What is a judge? Who is fit to be a judge?

The late Newton D. Baker, an eminent lawyer and Secretary of War in World War I, once asked himself these questions, and then answered:

"A man of learning who spends tirelessly the weary hours after midnight acquainting himself with the great body of traditions and the learning of the law. . . .

"A man who bears himself in his community with friends but without familiars; almost lonely, devoting himself exclusively to the most exacting mistress that ever man had, the law as a profession in its highest reaches, where he not only interprets the law but applies it, fearing neither friend nor foe, fearing only one thing in the world—that in a moment of abstraction, or due to human weakness, he may in fact commit some error, and fail to do justice.

"That is the judge."

At least, it ought to be.

—Extracted from "What Makes a Good Judge" by U. S. Dist. Judge John C. Knox in the December, 1949, American Magazine

AMERICAN BAR ASSOCIATION SECTION

The publishers of Case and Comment donate this space to the American Bar Association to permit the Association to bring to our readers matters which the Association deems to be of interest and practical help to the general practitioner.

The First Regional ABA Meetings

THE two regional meetings recently sponsored by the American Bar Association at Atlanta, Georgia, and at Dallas, Texas, have proven to be milestones in the progress of bar association activities in this country. They showed that there is a need for meetings of this kind and that the lawyers of the country will support them when offered outstanding programs of real interest. These meetings will serve as a model in bringing the advantages of the American Bar Association to the rank and file of lawyers on their own home grounds at planned future gatherings in other parts of the country.

The Southeastern Regional Convention—Atlanta, Georgia

THE first Southeastern Regional Convention of the American Bar Association, held in Atlanta, Georgia, March 7–10, was a red letter event. It brought together under one roof in a hospitable southern city a homogeneous group of lawyers from North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, and Tennessee—and gave them a full and well-balanced program of inspirational addresses, workshop lectures, round-table discussions, social diversions, and the warm and informal fellowship one might expect in such a setting. It brought the American Bar Association for the first time to hundreds of lawyers under happy and auspicious circumstances.

This meeting was given the full support of the officers and members of the Board of Governors of the Association, many of whom participated in the sessions. And the fact that the bar associations of the seven states took a formal and active part in the planning of the meeting and in extending the invitations thereto added to its representative character and success.

The workshop courses were under the leadership of expert lecturers well known in their fields, and in down-to-earth fash-

ion, they gave to the lawyers who attended them much worthwhile advice to aid them in their every-day professional problems. Many noted national figures addressed the two Assembly Sessions on "Public Relations" and "World Problems" and ten Sections of the Association had well-organized programs of the highest character.

The sweep of this gathering, and its impact in the area, is indicated by the fact that all the courts in greater Atlanta adjourned in order that the lawyers and judges might attend. Many judges and lawyers who had not had previous contact with the Association were in attendance, and made their contribution to the success of this regional meeting by participating in its seminars and round-table discussions.

The Southwestern Regional Meeting—Dallas, Texas

THE American Bar Association and The Southwestern Legal Foundation jointly sponsored a week of lawyers' meetings at Dallas, Texas, April 16–21, for the states of Texas, Louisiana, Arkansas, Oklahoma, and New Mexico.

Workshop institutes on trial tactics, legal draftsmanship and recent changes in the law of taxation featured this Regional Convention. Public relations, legal aid, prelegal education and international law and relations institutes completed a week of continuing education for practicing lawyers of the Southwest.

The three newly-completed air-conditioned buildings of The Southwestern Legal Center, costing more than $2,000,000, were dedicated. Leaders of business, labor, education, the legal profession, jurists, and government held a joint conference to consider improving the administration of justice. A special feature discussion on world affairs emphasized the lawyers' responsibility in the present crisis.

The 1951 Annual American Bar Association Meeting

THE Seventy-Fourth Annual Meeting of the American Bar Association will be held in New York City, September 17–21. All signs indicate that this will be the best attended Annual Meeting ever held. But the Association needs the help of all lawyers in good standing in its work of promoting the administration of justice.

You can secure an application blank from any ABA member in your area—or write to Membership Department, American Bar Association Headquarters, 1140 North Dearborn Street, Chicago 10, Illinois.

The Place of The United Nations Charter

by DR. IVAN KERNO
United Nations Assistant Secretary-General
for Legal Affairs

Condensed from the United Nations Reporter, June, 1950

IT IS my profound conviction that international law is not and cannot be a static science but must keep pace with the evolution of human society.

In the long period during which the international community was entirely unorganized, international law could and had to confine itself to the study of relations between states and between states only. But today we are in an entirely different situation. The international community has already an organized form in the United Nations. It is extremely important to determine the place which the Charter of the United Nations occupies in the contemporary growth of international law.

According to classical theory, the Charter would be regarded as a simple multilateral treaty between a number of states. Therefore, it would be considered only as particular conventional international law, constituting merely an exception to general international law.

In our time, however, such a theory seems hardly acceptable. More and more we should come to the conclusion that the Charter is not only a multilateral treaty but a kind of World Constitution, or at least a kind of international common law, having increasingly marked repercussions not only for the member states but for the international community as a whole.

Recent pronouncements of the International Court of Justice and of the International Law Commission contain valuable indications which point in the same direction. The representative of the United States Government, the Honorable Benjamin Cohen, declared in his oral statement before the International Court of Justice in the case of the Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania: "The Charter is something more than a mere treaty or convention between the parties thereto. It is the constitution of the international community."

The constitution of the international community is of course still very young and difficulties stand in the way of its smooth and efficacious working. In these first years of growth it needs constant care and attention.

TAXES AND YOUR CLIENT

The Tax Side of
Everyday Legal Problems

By BERNARD SPEISMAN of the New York Bar

Editor, Alexander Federal Tax Handbook
Former Editor, Alexander Tax News Letter

Time For Reporting Gain Or Loss And Other Tax Incidents Of Real Property Sales

A PERIOD of time usually elapses between the date on which a contract for the sale of real estate is made and the date on which the conveyance is effected. Since income is reported on an annual basis, such interludes may, if extended beyond the taxable year of the seller, affect the year in which gain or loss must be reported, with potential effect on the tax liability.

By the same token, the possibility of controlling the time for realizing gain or incurring loss on the transaction may be controlled to the seller's advantage. This is particularly true if the seller is on the accrual basis of accounting, since the time of receipt of payment is not material as it is for taxpayers on the cash basis. On the accrual basis, a gain is generally realized when the right to receive the consideration becomes fixed and is reasonably ascertainable in amount.

Moreover, variations in facts may affect the time of reporting gain or deducting a loss and it is important to understand the effect of common patterns of conveying title because the result of the transaction must be reported on the tax return for the proper year; it may not be reported in any other year.

As long ago as 1920, the Internal Revenue Bureau ruled that no gain or loss is realized when a contract to sell real estate is executed, but that the transaction is closed for tax purposes either (a) when a deed passes, or (b) when possession and the burdens and benefits of ownership pass, whichever occurs first (ARR13, Cumulative Bulletin, Vol. 2, p. 78; LO 88, Cumulative Bulletin, Vol. 2, p. 83). More recently, in the case of Wurtsbaugh v. Commissioner, 8 T Ct 183 (1947), the Tax Court in deciding that gain from the sale of real estate was taxable on the accrual leases in 1941, rather than 1940, stated:

"By the end of 1940 the negotiations and agreements concerning the sale in question had reached the stage where there existed an executory agreement to sell at a prescribed price, the form of the prospective deed of conveyance had been in general accepted, and the abstract of title had been found as a whole sufficient. But it was not until 1941 that title was finally approved and the deed of conveyance was signed passing title and the right of possession to the vendee or that any consideration passed. Under these circumstances, we do not think the sale constituted a closed transaction or that either the benefits or burdens of ownership passed to the vendee in 1940 so as to render the vendee liable for the purchase price in that year. For these reasons we do not think that any profit from the sale was realized or accrued for income tax purposes in 1940."

This would seem to reflect the usual case where performance of the contract is conditioned upon final approval of the seller's title, applying the general tax rule that items are not accrued as long as they are subject to some substantial condition. Thus, where real estate was purchased pursuant to an option and the purchaser indicated in the notice by which it exercised the option that it was ready to close the transaction and pay the purchase price "as soon as the papers were prepared", and the necessary papers to pass title were not prepared by the taxpayer until the following year, the Supreme Court held that gain on the transaction was not accruable in the year in which the option notice was delivered (Lucas v. North Texas Lumber Co., 281 US 11, 74 L ed 668, 50 S Ct 184).

To be distinguished from the cases noted in the preceding paragraph is a condition subsequent, i.e., where the full purchase price is received subject to partial repayment if warranties are not fulfilled. The tax rule is that an amount received (or owing on the accrual basis) under a claim of right is income notwithstanding that it may be necessary to repay part or all of the amount in a subsequent year by reason of conditions or warranties in the contract (North American Oil Consolidated v. Burnet, 286 US 417, 76 L ed 1197, 52 S Ct 613; Spring City Foundry Co. v. Commissioner, 292 US 182, 76 L ed 1200, 54 S Ct 644). Thus, where a contract of sale of land, timber and manufactured lumber was made in 1923 and the purchaser paid part of the agreed price and obtained possession in the same year, it was held that the entire gain on the transaction accrued to the seller in 1923 although the contract provided that the purchase price was to be reduced pro tanto if the acreage or manufactured lumber on hand proved to be smaller than speci-

fied by the seller (Helvering v. Nibley-Mimnaugh Lumber Co., (1934) 63 App DC 181, 70 F2d 843). The proceeds are realized on the accrual basis when the buyer's obligation becomes fixed although the purchase price may not be paid until a later year (c.f. Commissioner v. Union Pac. R. Co., (1936, CA2d) 86 F2d 637). And once possession and beneficial ownership have been transferred to the buyer, it is immaterial that formal delivery of title was postponed (c.f. Standard Lumber Co. v. Commissioner, 28 BTA 352).

Similarly, gain was held taxable when the seller executed and recorded a deed to the purchaser, subject to return of the purchase price in case the seller's title proved defective. (Frost Lumber Industries, Inc. v. Commissioner, (1942, CA5th) 128 F2d 693).

However, where the purchase money, or part of it is placed in escrow subject to the performance of stipulated conditions, it is not realized by the seller until the conditions are performed. This rule would seem properly to apply irrespective of the fact that possession may have been given to the purchaser before release of the purchase money to the seller, as was held in R. M. Waggoner's Appeal, 9 BTA 629. (See also Bedell v. Commissioner, (1929, CA2d) 30 F2d 622). Once the terms of the escrow have been satisfied, and the income is available to the seller, it is then taxable though the seller delays in obtaining payment (Holden v. Commissioner, 6 BTA 605). In such case, the rule is, in practical effect, the same under the cash receipts basis as under the accrual basis because the amount is deemed to have been constructively received.

The rules as to deduction of losses on the sale or other disposition of real estate are the same as those governing gains. However, where a loss is sustained on foreclosure of real property and there is an equity of redemption under state law, the loss is not sustained until the year in which the equity of redemption expires (GCM 19367, Cumulative Bulletin 1937–2, 115; Commissioner v. Hawkins, (1937, CA5th) 91 F2d 354; Shelden Land Co. v. Commissioner, 42 BTA 498). However where there is no equity of redemption under state law, the loss is sustained when the foreclosure sale takes place, not the prior date when the decree of foreclosure is entered (Helvering v. Hammel, 311 US 504, 85 L ed 303, 61 S Ct 368, 131 ALR 1481). And where the right of redemption existed, but the cost of redemption was substantially greater than the value of the property and the owners decided definitely in the year of foreclosure that they would not redeem, the loss was held deductible in that year rather than in the year in which the equity expired (Abelson v. Com-

missioner, 44 BTA 98, Nonacquiesced by the Commissioner).

It has in recent years been established that the owner of property may realize a gain on foreclosure, as where the basis of the property after reduction in respect of depreciation is less than the amount of indebtedness canceled in connection with the foreclosure. The Tax Court has held that where there is an equity of redemption, the gain is realized in the year when the equity of redemption expires, not when the property was foreclosed (R. O'Dell & Sons Co. v. Commissioner, 8 T Ct 1165, affd (1948, CA3d) 169 Fed 247, 3 ALR2d 635).

Other considerations affect the purchase and sale of real estate in certain instances. One is the question of the holding period in respect of the seller. For example, the seller gives possession and beneficial interest to the buyer at a time when he has owned the property for a period less than six months, but title is formally conveyed on a date more than six months after purchase. Does the seller have a long-term or a short-term capital gain or loss? Ordinarily, the holding period is measured by reference to the date that a transaction is completed by delivery of the subject matter or of instruments of title (Shillinglaev v. Commissioner, (1938, CA6th) 99 F2d 87; Howell v. Commissioner, (1944, CA5th) 140 F2d 765, 768).

However, the Bureau has ruled that the buyer's holding period starts from the time that he enters in possession and obtains the benefits of ownership, and the seller's holding period would terminate at that time irrespective of later delivery of a deed (see IT 1378, Cumulative Bulletin Vol. I–2, p. 26). On the other hand, it has been held that the holding period terminates when conveyance is made rather than when an option to purchase is exercised (Fisher v. Commissioner, 14 T Ct No. 98), and when the escrow condition is fulfilled rather than when the property is placed in escrow (Dyke v. Commissioner, 6 T Ct 1134, acquiesced by the Commissioner).

In conformity with the rules in other respects annual depreciation allowances inure to the purchaser once possession and the benefits of ownership are passed, though title is not conveyed until later (IT 2275, Cumulative Bulletin Vol. V–1, p. 62).

If title is placed in escrow, depreciation allowances belong to the one having the right to receive the rents or to have them applied against the purchase price (IT 2275, supra; Hanson v. Commissioner, 23 BTA 590).

The tax incidents of the various transactions noted depend on the agreement made by the parties, and they are accordingly within the control of the parties.

Legal Assistance in Continental Europe*....

By ERIC F. SCHWEINBURG

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Condensed from
The University of Chicago Law Review,
Winter, 1950

It is possible to speak, at least with respect to Western Europe, of a predominant Continental pattern of legal assistance. It is likewise possible to neglect the time element. Certain basic institutions of the law have a way of being extremely resistant against social and political turbulence. On the Continent, legal assistance is among these. We may assume that its fundamentals will in none of the countries, except perhaps those which now have slid into the "solar system" of the Soviet Union, be subjected in the near future to any considerable reform.

Two features are characteristic of Continental legal assistance. One is the integration of assistance schemes with the general administration of justice. The other consists of the use of unpaid, assigned lawyers for the performance of the work. As a result of this integration with the general judicial system, the assisted litigant obtains in one arrangement the service of counsel and the exemption from court fees and other expenses incidental to litigation, insofar as these are payable to the court. To express this in terms familiar to the American lawyer: The benefits which ought to be accorded by a complete *in forma pauperis* statute and those which our legal aid organizations have made their concern are obtained with one application.

Nevertheless, it frequently happens that a person exempted from payment of court fees and other essential disbursements must proceed without counsel, or proceed voluntarily with one whom he has privately retained. However, it cannot happen, as may be the case in this country, that a person is supplied with counsel without being automatically provided also with all fee

* This is a condensation of a portion of an article entitled "Legal Assistance Abroad," identical with a chapter of a comprehensive study on the need for legal services in the United States, prepared under the sponsorship of the Russell Sage Foundation and on the request of the National Association of Legal Aid Organizations. The opinions expressed are those of the author and no responsibility for them is assumed by the Russell Sage Foundation.

exemptions and all necessary funds for appropriately pursuing or defending the case.

The second characteristic of legal assistance on the Continent, the reliance on unpaid assigned lawyers, displays its outstanding imperfection. While in criminal cases of the most serious kind, assigned defenders are generally accorded a fee out of the public treasury, this fee is by no means compensatory. In civil matters, and in the run of criminal cases, not even this incomplete compensation is available. The work must be done without pay in fulfillment of a professional duty, and suffers accordingly.

If the opponent of the assisted person in a civil case is financially irresponsible, or if a criminal case does not promise to arouse public attention, the assigned lawyer is likely to be apathetic. If the opponent, however, is financially responsible, and may become liable to pay the fees of the assigned counsel in the case of defeat, the situation will be marked with some of the unpleasant implications that are suggested to us by the mere words "contingent fee."

One of the most satisfactory points of the Continental system, on the other hand, is the flexible *and* relative poverty formula used in the awarding of the privileges. The formula is flexible because it does not indicate a specified sum of income or property as a rigid criterion for eligibility. It is relative because it takes into account the expenditure involved in the conduct of the legal action at hand. Both flexibility and relativity are achieved simply enough. The privilege is declared available to any person who is unable to pursue or defend the case at hand without jeopardizing his own support or that of his dependents. As soon as the eligible person need not be "poor" in the sense that he does not have an income above a certain low amount, or is not "worth" more than a certain sum of property, eligibility loses its humbling implications. We

are no longer confronted with a public charity, but with a service belonging to a complete administration of justice.

Further, let us imagine the case of a person with moderate means who has a large claim, or one likely to require complicated and expensive court action. While that person may have sufficient funds to carry on a small lawsuit without encroaching upon his support and that of his dependent family, he may perhaps be unable to afford the sizeable action which his particular situation demands. The relative formula of Continental legal assistance affords him the means of pursuing his rights, while the very situation which under the relative formula may be instrumental in providing him with assistance—the volume of his claim or suit—would in Britain and the United States deprive him of legal aid.

Another characteristic of all Continental systems is the complete separation of litigious assistance from legal advice and preventive work. In practically all the countries in question two distinct schemes are at work. Each is independent of the other. Assistance in litigations and criminal matters is a part of the general administration of justice. Legal advice and preventive work are left to the local authorities or to the self-help endeavors of occupational groups.

The two services are distinct also with respect to the time of their origin. While litigious assistance in most instances was brought into being, or into its current shape, as a part of the procedural innovations of the nineteenth century, the legal advice offices arose, by and large, in the first decades of the twentieth century. These advisory programs have not attained the same significance in the legal affairs of the people as the more developed litigious schemes.

The common features of Continental legal assistance outlined above do not prevent a marked division of the individual schemes into two major groups. This dichotomy is the result of a difference in approach to a single crucial issue. Should the grant of assistance be made dependent on an examination of the legal merits of the case? Or should the applicant's financial situation be the only test?

The countries which make the award of litigious assistance depend solely on the financial status of the applicant, and have the case considered no further than to eliminate obvious nuisance litigation, manage to get along with a very small administrative apparatus. The ordinary court departments and trial judges suffice. Their role in the program is part of their regular work, and increases it but imperceptibly.

The countries, however, which

insist on an additional investigation into the legal merits of the case, find it necessary to administer their schemes through separate bureaus. The sifting of the applications by these special offices is combined with attempts at conciliation. Prospective members of the bar are generally required to participate in this work, and are thus given a valuable chance to acquire practical experience in their profession.

Austria, Czechoslovakia, Germany, and various Swiss cantons have adopted the less elaborate procedure. Belgium, France, Italy, and the Principality of Monaco add the "legal merits" test to the "means" criterion.

The preponderantly Germanic pattern has the advantage of being simple and liberal. It gives wholehearted recognition to the fact that in the majority of instances the legal merits of a case can be decided only by means of a judicial trial. No short cut to judicial determination of applicant's rights is deemed adequate.

The second type of scheme, on the other hand, weeds out obnoxious litigation more strictly and thereby brings about greater protection to the opponent of the assisted party. Whether or not this type lessens the expense to the public treasury depends on the costs connected with the administration of the separate bureaus as compared to savings made by reason of cases which it serves to eliminate, either through rejections or through successful conciliation.

The elaborate legal examination of the cases, together with the element of conciliation characteristic of the preponderantly Latin schemes, makes it finally possible to use legal assistance for aims of legal education. The prospective French or Belgian lawyer serves, as pointed out above, part of his required postgraduate apprenticeship training in the special court departments administering legal assistance.

One of the features of these Latin schemes requires special mention. The decisions of the departments for sifting and passing upon the applications, in France and Belgium, called *Bureaux d'assistance judiciare gratuite*, are not appealable, except by the *procureur général*, the highest officer in the system of public prosecution. This is a palpable weakness. Because of it, the departments are accorded too much discretion for pursuing a narrow policy. The feature is, however, not inherent. Nothing in these schemes conflicts with subjecting the decisions of the *bureaux* to ordinary judicial review upon appeal by either party.

Every-Day Law for High School Seniors

By HON. EDWARD C. DAY
Judge of the Denver, Colorado District Court

Reprinted from Dicta, May, 1950

A LITTLE known course at West Denver High School—probably the only one of its kind in the country—is indirectly, and perhaps by pure accident, doing more to foster good public relations for the legal profession than many of the planned programs.

Called "Every Day Law for Seniors," the lecture course is part of the general education classes in the school. It was designed to prepare the high school seniors for better citizenship. Its indirect effect has been to awaken an awareness in the students of the vital part the legal profession plays in community life. When these seniors have completed this course they have had forcibly demonstrated to them that consultation with lawyers concerning many everyday transactions of life is just as important as "seeing their dentist twice a year."

The prime objectives in this lecture course are (1) to increase the students' knowledge concerning laws governing their everyday living; (2) to show that law is a basic device for protecting the individual and assuring his freedom; (3) to help the students realize the limitations of their privileges, rights, and freedoms in society so that they may live more harmoniously with each other; and (4) to show that *people* make laws and that laws are not static but that they are dynamic.

To accomplish these objectives the students are told about:

1. Laws concerning parents' responsibility toward their children.
2. Laws concerning education of children.
3. Laws concerning marriage and divorce.
4. Laws pertaining to insurance.
5. Laws pertaining to wills and inheritance.
6. Laws regulating travel and public conveyances.
7. Employer-employee relationships and the laws important to those relationships.
8. Laws concerning the purchase of property, real and personal, with the related subjects of chattel mortgages and landlord and tenant relationships.

In addition to the general lectures by teachers who have spent considerable time in research to present—but not to interpret—the basic laws enumerated above, high-ranking members of the legal and other professions are called upon to give talks before the groups. Thus, invitations are extended to judges and attorneys to discuss marriage and divorce laws, wills and estates, real property laws, etc.; to the Juvenile Court judge to discuss the responsibilities of parents toward children and the laws concerning the compulsory education of children. Other discussions are led by insurance men, labor leaders, and real estate people. In addition, the students visit the marriage clinic and the courts.

Concerning the laws governing travel, the students get into related subjects involving hotel law and the various guest rules. They enhance their knowledge by gathering up copies of hotel rules for guests, samples of travel insurance policies, and by interviewing hotel managers, bus drivers, airplane pilots, and train conductors.

Aware of the success that this course has enjoyed, the Denver Bar Association Committee on Public Relations is undertaking to formulate a plan whereby similar courses can be introduced into the public and parochial high schools in Denver and in high schools throughout the state of Colorado. It may be that because of fixed curricula it will take considerable time to work in such a program. A good start, however, can be made by offering to the various schools lawyer-lecturers to talk on the various subjects that demonstrate the every-day laws which touch the citizen in everything he does throughout the day. Starting with the vital statistics regulations which make necessary the registration of his birth, and ending with the laws and regulations governing where and how deep he shall be buried, the citizen lives under fundamental legal and moral obligations so numerous that he is hardly conscious of them as such and takes most of them for granted.

Many citizens go through life getting into trouble, losing money, or paying usurious interest without ever obtaining legal advice from its most obvious source, the lawyer. But it is probable that few, if any, of the future citizens from West Denver High School will ignore or shy away from the legal profession when it comes to their daily transactions. So if the Committee of Public Relations of the Denver Bar Association can expand its program to include the youth of the city of Denver, all of them—potential clients of the future—will have a better understanding of, and a better feeling toward, the legal profession.

That's the best kind of public relations.

FORENSIC PSYCHIATRY

or

How to Be Happy Tho' Cross-Examined*

Reprinted from the Columbia Law School News, November 13, 1950

IT IS best not to use technical terms because the jury cannot understand them, i.e., use "high blood pressure" rather than "hypertension."

Generally speaking, a witness can be cross-examined only on what has come up on direct examination. Therefore, the less you say on direct examination the less you will be cross-examined on.

Usually the qualifications of a doctor are not challenged by the opposition. Sometimes, however, your lawyer will want your qualifications stated to impress the court and the jury.

Qualifications may be challenged:

A. If a specialist, your field is too narrow.

B. If not a specialist, your field is too large.

C. If old, you're not "up" on the latest.

D. If young, you're too inexperienced.

Don't argue with the lawyers, they can argue better because they are trained for it.

When asked, "Doctor, did you do a complete examination?", answer, "I did as complete a one as necessary in this case." Lawyer may trip you up on certain tests, etc., if you claim you did a "complete examination."

Generally textbooks cannot be introduced as evidence because you cannot cross-examine a book. However, lawyer can ask you if you consider a certain author an authority. The following are possible answers:

A. Ask date of the book.

B. May not consider the author an authority.

C. Best is to consider the author an authority in certain aspects. This leaves you an opening in case there is disagreement between the author and you.

D. Prepare yourself with a good textbook which takes your point of view. However, do not cite this until the opposition brings up the question of textbooks.

If lawyer asks you, "What

*This material was taken from lecture notes mimeographed for psychiatry students at Bowman Gray School of Medicine at Wake Forest College. It represents an interesting viewpoint of the cross-examination of expert medical witnesses.

other conditions can cause like symptoms?," this is a trap. The answer is, "Do you mean in this case or in other cases?" If he answers the former, your answer is, "No other conditions." If he answers the latter, your lawyer should object.

Never mention the words "insurance company" in a trial. The court considers this will prejudice a jury and a mistrial may be declared.

To Be Remembered:

A. Don't lose your temper.

B. Don't assume that you know it all, because the opposition has also been briefed by a physician. Also, a lawyer's ignorance of medicine itself makes him dangerous.

Fee Structure:

A. Acceptance of a fee contingent upon the outcome of a case is unethical.

B. Fee in administrative tribunals, workmen's compensation, food and drugs, etc., is set by the court or by law.

C. Fee in other cases is a matter of business. It is best to charge on a time, or portal-to-portal, basis, and stress that your fee is not contingent upon the outcome of the case.

Courtroom Etiquette (in upper courts):

A. Judges have a great feeling of respect for the court and for law and the court is a place of decorum.

B. Watch your conduct in court. Don't read, whisper, etc. Try to keep the judge from getting irritated at you.

C. You may address the judge as "Your Honor," or "Sir."

D. When your testimony is over, leave the courtroom and do not hang around, because if you do:

a. Public may think you have no practice.

b. Public may think that you have an interest in the case.

c. By leaving, you will cause the jury to think that you are willing to stand on your testimony.

Of particular importance is the question of psychosis. Opposing lawyer may ask, "Doctor, how do you know this man is insane?" Do not answer that he has hallucinations, delusions, and illusions, because the patient must have told you these things and therefore it is hearsay evidence and not allowable.

The Best Evidence?

"Your age, madam?" asked the Judge.

"Thirty years," replied the lady witness.

"You may have difficulty proving that," said the Judge.

Replied the witness: "You will find it difficult to prove the contrary. The church that had the record of my birth burned down in 1900."—National Safety News.

Community Responsibility in Crime Control

By O. W. WILSON
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Condensed from Federal Probation, March, 1950

CRIME, like the poor and taxes, we always have with us. Public officials have the duty of protecting society from criminals—a duty that is usually interpreted as action after the criminal act. Little or no attention is given to the direct eradication of criminality.

Most persons consider their responsibility of citizenship discharged when they elect public officials to perform these tasks. Scarcely any citizens consider they have a responsibility beyond this point. They are content to blame public officials for the criminality of their communities.

Citizens, however, have a larger responsibility than this. In the final analysis, it is they who are responsible for the criminality of their communities. While the final responsibility for crime must inevitably rest with the community, law-enforcement officials have the duty to make citizens aware of their responsibility and to provide initiative and guidance to them in their discharge of it. A successful attack against crime cannot be launched without community support.

For many years society has been attempting to discourage criminality by punishment. Punishment was intended to reform the individual criminal, to deter the potential offender, and in some cases to protect society by denying freedom to the criminal. The results have not borne out these expectations, except that while confined the criminal cannot prey upon society. There seem to be valid reasons to believe that long term incarceration and punishment do not effectively deter potential offenders. Also, the recidivism of a substantial portion of persons sentenced to penal institutions indicates that this treatment usually fails to restore the criminal to useful life in society. Justice administered by arrest and punishment following the criminal act frequently strengthens criminal attitudes and tendencies; it does not prevent the development of criminals and it has not lessened the extent of criminality.

Persons convicted of crimes may be divided into three groups. Some are irredeemable—they

are the culls. These must be identified and segregated as a protection to society. Others are mentally and emotionally not equipped to deal satisfactorily with life, but they may be salvaged. Their attitudes may be corrected by treatment or by normal maturation so that they may be returned to society as free and useful beings. A small percentage are convicted of crimes committed, in a sense, accidentally. These persons are as well adjusted as the average person and do not require the treatment designed for the maladjusted. The penal experience, however, may do serious damage to their attitudes; they may then return to society embittered and poorly equipped mentally and emotionally to pick up once more the strands of their lives.

A failure to identify the irredeemable man, to correct the attitude of others, and to prevent the penal experience doing further damage to the mental-emotional condition of individuals results in the release of persons to prey further on society. Devices are needed for appraising more accurately the mental-emotional condition of the individual in order to guide treatment and release.

Effective crime control necessitates preventing the development of individual criminals. Limiting crime control to administering justice after the criminal act is as nonsensical as restricting fire control to fighting the blaze after it has started or limiting the control of disease to its cure after infection. Fire and disease are best controlled by preventing their inception; conditions favorable to combustion and to the growth and transmission of disease germs must be eliminated. Likewise, if crime is to be prevented, conditions that predispose to criminal behavior must be corrected.

Efforts to repress criminal activities by the conventional means must not be abandoned, however. So long as there are criminally inclined persons, protection must be provided against them. The most effective efforts to prevent predisposition to criminal acts will not succeed in every case, and failures must be repressed in their criminal behavior by suitable police supervision; those who commit crimes in spite of police prevention efforts must be apprehended and dealt with in the manner prescribed by law.

If real and permanent progress is to be made in the war on crime, a program of crime prevention must be designed to prevent the development in children of mental-emotional conditions that may result in criminal behavior and to correct these unsatisfactory conditions when they become implanted. Society should shield its children from undesirable experiences (those that seem to recur more frequently in the lives of the maladjusted and less frequently in the

lives of the well adjusted) and provide them with desirable experiences (those that seem to recur more frequently in the lives of the well adjusted and less frequently in the lives of the maladjusted). In spite of what may be done, however, some persons will develop delinquent tendencies. These must be detected and treated to prevent their development into adult criminals.

Criminal behavior is susceptible to effective control only at the community level. Life in the home, the school, the neighborhood, and the community provide the experiences that influence the development of the mental-emotional state of the individual. Crime must be prevented at its source in the community during the development of the individual from infancy to maturity. Influences that induce delinquent tendencies must be eradicated and the evil results of such experiences must be corrected if the individual is to be saved from a life of crime.

The active interest and participation of individual citizens and groups are so vital to effective crime control that they should be organized to assist in co-ordinating community effort. The co-ordination of the public and semipublic agencies which must participate in community crime control is sometimes difficult to achieve because of their independent and unrelated character. Conferences with agency representatives promote co-ordination by clarifying relationships, defining responsibilities, and outlining the aims and methods of each. Community-wide interest and participation also assure public support.

The community must be organized to fight organized crime. Organized crime is the combination of two or more persons for the purpose of establishing terror and corruption, in a state, city, or a section of either, a monopoly or virtual monopoly of criminal activity in a field that provides a continuing financial profit. Organized crime is organized by gangsters. Continued criminal operation uninterrupted by police interference, or with police interference rendered comparatively innocuous by dismissals and indifferent prosecutions, necessitate the corruption of public officials; monopolistic control necessitates killing intruders to eliminate those who attempt to muscle in on the profitable venture and to warn others who likewise may be tempted. Tremendous illegal profits make organized crime possible; otherwise public officials could not be easily corrupted and the risk of killing and being killed would not be justified. Huge profits in gambling, prostitution, narcotics, and liquor control make these the fields for organized crime; in them racketeers attempt to establish monopolies by corruption and terrorism.

Vice operations also foster the development of criminality and

facilitate criminal activities; they attract criminals whose emotional instability, lack of home ties, and weakness of character cause them to seek recreation and relief from reality in vice indulgencies. Criminals are important customers, so vice operators frequently aid them in disposing of their loot, hiding from the police, and planning their depredations. Avenues of control that permit vice operations in violation of law are found useful to criminals in thwarting the administration of criminal justice.

Vice profits, when permitted in any community, are an open invitation to the gangster to organize the criminal activity in order to assure continuing and greater profits. Organized crime becomes entrenched in a community only through some form of political corruption; once entrenched, Herculean efforts are required to eradicate it. Law-enforcement efforts to eliminate organized criminal vice operations meet strong resistance; in some communities the resistance is more than the police can overcome, in which case they lessen their efforts or are broken in their attempt. In no community can vice be controlled satisfactorily without strong public support. All citizens have a responsibility to see that their community is free from vice; only then may they be certain that their government is free from corruption. Only an aroused public can assure the removal of such evil forces from the community.

Communities also must be organized to co-ordinate public and semipublic agencies concerned with preventing the development of delinquent tendencies in children and to win public support for their programs. Their objectives should be the eradication of unwholesome influences in the community, the provision of wholesome activities for children, and the co-ordination and direction of community facilities toward the successful treatment of individual delinquents and predelinquents.

The school exerts a longer and more intensive influence on the development of the child than any other agency. Is full advantage being taken of this influence in the deliberate development of wholesome traits in children? Is there a need for a more formal direction of school effort toward training children in how to live more satisfactory, useful, unselfish lives? Might a program designed to make better citizens of children be continued through all the school years? Such a program should be designed primarily to make better citizens of all children. The schools may reply that such training is a part of the entire present program. Perhaps it is, but the stake to be gained by improvement in teaching in this field justifies careful scrutiny of present procedures.

Because of the close and prolonged relationship of the school to the child, an excellent opportunity is presented to identify the predelinquent child. Classroom and playground behavior and scholastic records frequently indicate potential delinquents. Psychometric tests and measures of physiological evidences of emotional stresses may be developed to identify those in need of attention.

Society is justified in X-raying its members to detect incipient tuberculosis. It seems just as important that devices should be developed and used to detect incipient delinquency. As inroads have been made against disease, so will progress be made in the war against crime when a determined effort is made by every community to eradicate conditions that promote criminality and to examine its children with a view to identifying those with tendencies toward delinquent behavior.

The problem child who will become the criminal of tomorrow can be identified. Since this is so, is it not wise that effort be made to eradicate the conditions that are inducing his delinquent tendencies and to undertake treatment to correct them at this early stage of his development? Why wait until he has committed some irreparable damage? His mental-emotional condition is then so fixed as to make correction difficult if not impossible.

No agency is as well suited as the school to discover children who stand in need of special attention and to undertake action necessary to correct the situation.

Lawyer's Teeth Tricky

Although the National Health Service is a controversial matter in Britain, its merits or demerits were not at issue in a case before the Ministry of Transport Appeal Tribunal not long ago. One of its consequences were, however, and a barrister representing the British Railways had to make this statement to the court:

"If I might make an intimate revelation, sir, my National Health Service teeth are troubling me considerably, and before I have to talk again I should be much obliged if a period of time could elapse. My tongue is as sore as anything."

According to The London News Chronicle, the chairman of the court, much touched by the barrister's suffering, replied:

"Yes, certainly. We shall take that into consideration."

—New York Times

Shakespeare and the Inns of Court

By Richard O'Sullivan, K.C.

Reprinted from the Law Times (England), February 9, 1951

Apart from the strong tradition that Shakespeare's *Twelfth Night* was performed at the Middle Temple in the presence of Queen Elizabeth on 2nd February, 1601, there is a body of opinion or belief that certain of the other plays of Shakespeare were written for an audience of lawyers and most likely for an audience of lawyers of the Middle Temple.

In a recent work, a distinguished Shakespearean scholar, Dr. Leslie Hotson, has advanced reasons for thinking that two of the plays attributed to Shakespeare by Francis Meres in 1598 were written for lawyers of the Middle Temple and most likely played at the Middle Temple. These plays are described by Meres as Shakespeare's *Love's Labour's Lost* and *Love's Labour's Wonne*. The second of these plays Dr. Hotson identifies with Troilus and Cressida, the winning of love in this case meaning the sorrow or trouble which is gained or won in unhappy love. "I have had my labour for my travail," says Pandarus in the play.

Both these plays were evidently written for a select, academic audience and London's academic audience would naturally be found in the "four famous and renowned colleges" of the law known as the Inns of Court. These colleges (together with the Inn for Serjeants and Judges) made up the "most famous University for profession of Law, that is in the world." The performance of the *Comedy of Errors* at Gray's Inn and of *Twelfth Night* at Middle Temple shows that attendance at Shakespeare's Comedies was regarded by the Inns as one of the "commendable exercises fit for Gentlemen."

The linked plays *Love's Labour's Lost* and *Love's Labour's Wonne* (or *Troilus and Cressida*) by their titles, tone and contents, were pre-eminently suited for the Gentlemen of the Inns of Court. In *Love's Labour's Lost* the scene is laid in

the court of a prince whose fellow scholars have sworn to keep the statutes of their fellowship: to study and to see no women. The play is thickly sown with legal jests and in Armado's letter to the king the order to be observed in the right framing of an indictment (as given in West's *Symboleography*) is delicately caricatured. In *Troilus and Cressida* there are twenty-four parts for men and four for boy actors. The large number of characters and the parade of learning in the play, not least in the great speech of Ulysses, strongly suggest that the play was written for an academy, for a legal academy, and most likely for the members of the Middle Temple. The references to bolting and mooting and "the handling or arguing of a case" are indications of the kind of audience for which the play was written.

The researches of Shakespearean scholars are likely in the course of time to confirm rather than to impair the conclusions of Dr. Leslie Hotson, and to prove that the connection of Shakespeare with the Middle Temple and the Inns of Court was more extensive and intimate than has been supposed.

Expert Testimony

In a murder case a prospective juror was asked whether he was married. He replied, "I've been married five years, your Honor." Whereupon the attorney for the defendant inquired whether he had formed or expressed any opinion. He answered, "Not for five years."—The Shingle.

Good Law?

Legally the husband is the head of the house and the pedestrian has the right of way. Both are fairly safe until they try to exercise their rights.—The Kalends.

Patent Lawyers

There are some 5,000 persons registered and qualified to practice patent law in the United States. The seal of approval comes from the Patent Office, where examinations are held.

The examinations are by no means perfunctory. Witness the examination held by the Patent Office last year. There were 343 entrants. Of this number, only 141 made the grade and passed. Although the Patent Office is meticulous in its requirements for a passing grade, it does not require that the applicant for registration hold a law degree. Only 66 of the 141 who passed are members of the Bar. Graduates from engineering and other courses often expand their regular studies to include patent law.

—National Patent Council

Among the New Decisions

Additional Parties — *appealability of order as to.* In Chapman v. Dorsey, 230 Minn 279, 41 NW2d 438, 16 ALR2d 1015, an action to recover damages for injuries sustained in a collision of automobiles, the defendant sought to join as additional parties defendant the owner and operator of the car in which, at the time of the injury, the plaintiff had been riding as a guest.

A motion by plaintiff to dismiss the appeal and quash the writ of certiorari, seeking a review of an order of the trial court denying the motion for joinder of additional parties defendant, was granted by the Supreme Court of Minnesota, in an opinion by Justice Matson, which held that the order was not within the terms of a statute which authorized an appeal "from an order involving the merits of the action or some part thereof," or "from a final order, affecting a substantial right, made in a special proceeding." The writ of certiorari was held not to lie for the reasons that the order was intermediate in its nature, decisive of no issue upon the merits or of any part thereof, and was subject to review upon an appeal from a final judgment upon the merits.

The extensive appended annotation in 16 ALR2d 1023 is concerned with the question whether a judgment or order of a court granting or denying the joinder of additional parties at the instance of one of the original parties to the action or suit, or requiring the bringing in of additional parties upon its own motion, is, or is not, appealable.

Adequate Damages — *personal injuries.* The action in Blincoe v. Drury, 311 Ky 613, 224 SW2d 936, 16 ALR2d 390, was brought by an infant, through his father and next friend, to recover damages for personal injuries resulting from negligence of defendant who, while driving an automobile, struck the plaintiff at an intersection of city streets. A statute authorized a new trial for inadequate damages appearing to have been given under the influence of passion or prejudice, or in disregard of

the evidence or the instructions of the court.

It appeared from plaintiff's evidence, among other circumstances, that medical expenses amounted to $200 and that the plaintiff suffered a fracture resulting in a shortening of the leg, a tilted pelvis, and curvature of the spine, as well as a head injury resulting in recurring headaches; and from the defendant's evidence that any malformation was the result of rickets, rather than the fracture.

The Court of Appeals of Kentucky, in an opinion by Justice Cammack, affirmed a judgment entered on a verdict for $500, and held that under the evidence the verdict should not be disturbed as so grossly inadequate as to shock the conscience at first blush as being the result of passion, prejudice, corruption, or mistake.

The extensive annotation in 16 ALR2d 393 contains an exhaustive discussion of "Adequacy of damages in action by person injured for personal injuries not resulting in death (for years 1941 to 1950)."

Attorneys — *municipal tax on.* An original prohibition proceeding was instituted in Davis v. Ogden City, — Utah —, 215 P2d 616, 223 P2d 412, 16 ALR2d 1208, to prohibit the defendant city from including the practice of law within an ordinance imposing a license tax, graduated according to gross receipts, on all businesses conducted within the city. Authority to impose the tax was claimed under a statute providing that cities "may raise revenue by levying and collecting a license fee or tax on any business within the limits of the city, and regulate the same by ordinance." By previous judicial decision, a similar statutory authorization was construed not to extend to the practice of law because (1) of the existence of another statute in pari materia authorizing cities to "license, tax and regulate" enumerated businesses among which the practice of law was not included, and (2) of the repeal of a statute permitting license fees or taxes to be charged against lawyers. Subsequent to this decision, the above-mentioned statute claimed to authorize the tax was amended so as to provide "no enumeration of powers of cities . . . shall be deemed to limit or restrict the general grant of authority hereby conferred."

A temporary writ of prohibition was recalled and the action dismissed by the Supreme Court of Utah, in an opinion by Justice Latimer, which held that the effect of the statute specifically enumerating the businesses subject to license, tax, or regulation by cities, and of the repeal of the statute specifically permitting license fees or taxes to be charged against lawyers, was eliminated by the amendment so as to require a new approach to the whole problem. The court

thereupon construed the statute under consideration as authorizing the inclusion of the practice of law in the license tax ordinance, and rejected contentions of the plaintiff that the statute applied only to businesses subject to municipal regulation; that authority of the city was restricted by the status of attorneys as part of the judicial branch of the government, subject to its control, discipline, and rules of conduct; that the ordinance was invalid as an arbitrary discrimination in that it exempted attorneys in the employ of others; and that the ordinance exceeded the power delegated because it was in the nature of an income tax.

The appended annotation 16 ALR2d 1228 discusses "Validity of municipal license, privilege, or occupation tax on attorneys."

Automobile Guest Statutes — *infant as guest.* Kudrna v. Adamski, 188 Or 396, 216 P2d 262, 16 ALR2d 1297, was an action brought to recover damages for personal injuries to a four-year-old child resulting from alleged negligence in the operation of an automobile in which the plaintiff, in her mother's immediate custody, was riding. The car, which was owned by plaintiff's father, was being driven by the defendant without compensation at the instigation of the plaintiff's mother and father to take the child to a doctor's office. A statute provided: "No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such owner or operator for injury, death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator or caused by his gross negligence or intoxication or his reckless disregard of the rights of others."

A judgment on a verdict for the plaintiff was affirmed by the Supreme Court of Oregon. The opinion by Chief Justice Lusk, ruling that the exercise of a choice is essential to the status of a "guest" within the meaning of the statute, held that the child was not a guest for the reasons that a four-year-old child does not have the legal capacity to exercise a choice necessary to become a "guest" of its own volition; that the child in the custody of her mother, having no option other than to accompany the mother, cannot be said to accept an invitation to ride; that, even if the child were regarded as having the same status as its mother, the child could not be regarded as a guest because the defendant was driving as the agent of the father and mother; and that the defendant, as such agent, did not have the right to extend invitations to ride. The court, however, specifically declined to decide that a child of tender years could not, under any circumstances, be a guest.

The appended annotation in 16 ALR2d 1304 is entitled "Infant as guest within automobile guest statutes."

Automobile Insurance — *provision against encumbrances.* Globe & Rutgers Fire Insurance Co. v. Segler, — Fla —, 44 So 2d 658, 16 ALR2d 731, involved an action brought by the owner of an automobile on a policy of insurance against damage by collision. The policy had originally been issued on an unencumbered automobile traded in for the car involved in the collision to which the insurance policy had been transferred by a change of car indorsement. The indorsement was issued by the defendant's agent solely as the result of a telephone conversation between the plaintiff and the agent in which the agent did not inquire specifically about and the plaintiff did not make any statement as to, an encumbrance on the replacement car.

The original policy contained a provision for its inapplicability "while the automobile is subject to any . . . encumbrance not specifically declared and described in this policy," and the change of car indorsement stated that the insured was the sole and unconditional owner of the replacement car.

A judgment entered on an order overruling defendant's demurrer to plaintiff's replication was reversed by the Supreme Court of Florida. The opinion by Justice Hobson held that the

"I left my driver's license at home."

provision against encumbrances was valid and applicable notwithstanding the absence of inquiry by the agent, and of representations by the plaintiff, as to the encumbrance, and that the insured was bound by the terms of the policy accepted and retained by him.

An exhaustive discussion of "Validity and construction of provision of automobile policy against encumbrances" is contained in the appended annotation in 16 ALR2d 736.

Automobile Liability Insurer — *direct action against.* Actions, consolidated for the purpose of trial, were instituted in Ritterbusch v. Sexmith, 256 Wis 507, 41 NW2d 611, 16 ALR2d 873, to recover damages alleged to have been caused by the negligent operation of an automobile, against the personal representative of the driver and, pursuant to authorization of a statute of the forum, his insurer. The policy contained a provision, valid in the state where the contract was made, postponing liability of the insurer until establishment of liability of the insured and denying the right to join the insurer in an action against the insured. The insured was a resident of the state of the forum, wherein the vehicle was ordinarily kept and principally operated and the accident occurred.

A denial of a motion for summary judgment by the insurer, who relied upon the "no action" clause as postponing an action against it until liability was established by a judgment against the insured, was reversed by the Supreme Court of Wisconsin. The opinion by Justice Brown held that the "no action" clause was not waived in the absence of a specific policy provision subordinating it to the law of the state of residence of the insured and principal operation of the car, and that, although such clause in a policy written in the state would be void as repugnant to the statute, the statute could not be given extraterritorial operation so as to apply to a contract made in another state the law of which was regarded as controlling. The rule that the law of place of performance of a contract controls the extent of the obligation was considered inapplicable where the place of performance was not made definite and certain by the contract itself, which covered operation of the vehicle anywhere in the United States and Canada, or where a substantial contractual right would be nullified by application of the rule in violation of the constitutional prohibition of impairment of the obligation of contract.

The subject of the appended annotation in 16 ALR2d 881 is "Conflict of laws as to right of injured person to maintain direct action against tortfeasor's automobile liability insurer."

Ball Game — *injury by ball.* Salevan v. Wilmington Park,

(Del Super) 72 A2d 239, 16 ALR2d 1450, was an action brought to recover damages for injuries to a person struck by a baseball while lawfully using a public street adjacent to land of the defendant on which the defendant had constructed a baseball park which defendant leased to professional baseball teams. In constructing the park, the advice of baseball experts was incorporated in precautions taken for the protection of the public, but such precautions proved inadequate to prevent balls from being hit into the adjacent street a few times each game.

In an opinion by Justice Wolcott, the Superior Court of Delaware, applying the general principle that abutting owners may not use their lands so as to interfere with the rights of persons lawfully using the highways, held that the precautions required to be taken for the protection of the public depended on the inherent nature of the game and its past history in the particular location, and that the circumstances shown by the substantially uncontradicted evidence required the rendition of judgment for the plaintiff.

The appended annotation in 16 ALR2d 1458 discusses "Liability of owner or operator of park or other premises on which baseball or other game is played, for injuries by ball to person on nearby street, sidewalk, or premises."

Bulk Sales Act — *stockholder as creditor.* An action for relief as to a transfer of property in violation of the Bulk Sales Act was brought in Oklahoma Hotel Building Co. v. Houghton, — Okla —, 216 P2d 288, 16 ALR2d 1307, against the defendant transferrer and the garnishee transferee by the holder of common and preferred stock issued by the defendant. The stock had been given to the plaintiff in payment of a corporate debt with the privilege of receiving hotel service from the corporation in redemption thereof. Included in all the assets of the defendant corporation transferred to the garnishee was certain personal property, the subject of the instant action, consideration for the transfer of which consisted of the partial satisfaction of a debt of the corporation to the transferee.

A judgment against the garnishee for the value of the transferred personal property was reversed by the Supreme Court of Oklahoma. The opinion by Chief Justice Davison, regarding the privilege to redeem as dependent upon the existence of the defendant as a going concern and referring to the absence of an absolute promise to pay plaintiff a definite sum on a definite maturity date, held the plaintiff not to have the status of a creditor essential for relief under the Bulk Sales Law.

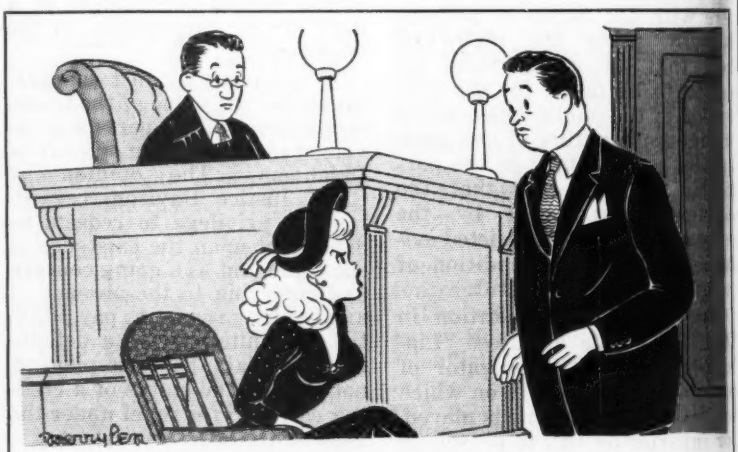
"Stockholders of corporation which transfers its assets as

creditors within Bulk Sales Act" is the subject of the appended annotation in 16 ALR2d 1315.

Custody of Children — *modification of divorce decree as to.* The defendant in Paintin v. Paintin, — Iowa —, 41 NW2d 27, 16 ALR2d 659, a divorce suit, made application for reduction of the award of support for his three minor children whose sole custody had been given the plaintiff mother. The application also contained a prayer for general equitable relief. In addition to reduction of the support award, the court, upon its own motion, modified the award of custody so as to grant the husband a partial custody. It appeared that both parties had remarried and that the defendant was living in a distant state. It did not appear that the defendant had a home suitable for the children or that his present wife was willing to have them.

The Supreme Court of Iowa, in an opinion by Justice Garfield, held that the changes made by the trial court in custodial rights were wholly without support in the pleadings which raised no issue as to custodial rights, or in the evidence which did not show such subsequent change of conditions as to require or make expedient a modification for the welfare of the children.

The "Power of court, on its own motion, to modify provisions of divorce decree as to custody of children, upon application for other relief" is discussed



"I hardly know you and still you ask me all those questions!"

in the appended annotation in 16 ALR2d 664.

Divorce — *revival of condoned adultery.* In Richardson v. Richardson, (1950) Prob 16, 16 ALR2d 579, a suit for divorce, it appeared that the wife had taken the husband back after condoning an act of adultery by the husband. The husband was shown, on subsequent occasions, to have been selfish and inconsiderate to his wife, to have made remarks hurtful to one of her sensitive temperament, and to have been turned out of his father-in-law's house where the parties had been residing.

The English Court of Appeal, in opinions by Lord Justices Bucknill, Asquith, and Denning, dismissed an appeal from a dismissal of the petition, taken on the grounds (1) that the commissioner was wrong in finding that there was no cruelty on the part of the husband; and (2) that the conduct of the husband had been such as to revive the condoned adultery.

Lord Justice Bucknill was of the opinion that, in order to revive condoned adultery, the conduct of the spouse must be such as to make decent married life together impossible.

Lord Justice Denning was of the opinion that the conduct of the husband would have been sufficient to revive the condoned adultery, if such conduct had been the cause of the breakdown of the marriage, but agreed that the appeal should be dismissed because the commissioner had found that it was not the cause.

Both the British and the American cases discussing the question are contained in the appended annotation in 16 ALR2d 585 entitled "Revival of condoned adultery."

Divorce or Annulment — *duress as ground.* A judgment dismissing the complaint in an action for annulment of a marriage, brought by a husband who claimed to have been forced into the marriage relationship by duress exerted by relatives of the wife, was affirmed by the Supreme Court of South Carolina in Phipps v. Phipps, 216 SC 248, 57 SE2d 417, 16 ALR2d 1426. The opinion, by Justice Taylor, held that a finding of the absence of duress sufficient for annulment was amply sustained by evidence which indicated that the plaintiff, who while engaged to the defendant, had induced her to have improper relations with him, resulting in her pregnancy, although threatened and restrained of his liberty for a time by relatives of the defendant, was never in actual fear of injury and had ample opportunity to overcome the effect of their actions by escape and by actual consultations with a relative and friend, but instead secured the marriage license and took part in the marriage ceremony pursuant to an agreement that a brother of the defendant would pay the expenses of a di-

vorce soon after birth of the child.

"What constitutes duress sufficient to warrant divorce or annulment of marriage" is the subject of the appended annotation in 16 ALR2d 1430.

Easement — *loss by misuse.* A dominant tenant sought in Penn Bowling Recreation Center v. Hot Shoppes, — App DC —, 179 F2d 64, 16 ALR2d 602, to enjoin the servient tenant from maintaining a barrier interfering with the right of way. The servient tenant's answer asked for a judgment declaring the easement to be permanently forfeited and extinguished by abandonment, and for a permanent injunction against its use.

It appeared that the dominant tenant had been using the right of way to bring fuel oil, food, equipment and supplies to, and removing trash, garbage, and other material from, a building constructed partly on the dominant and partly on nondominant property and housing bowling alleys and a restaurant. The building was situated on a public thoroughfare and could be remodeled so that the nondominant portion could be serviced therefrom. The area of the building was less than the area of the dominant property.

A summary judgment declaring the easement to have been permanently forfeited and extinguished, granting a permanent injunction against its use, and dismissing the complaint was set aside by the District of Columbia Circuit, opinion by Circuit Judge McAllister. It was held that the easement could not be used to serve the nondominant portion of the building; that, because of the possibility of remodeling the building so as to eliminate the increased burden, the unauthorized use of the easement did not operate as a forfeiture thereof; but that an injunction could issue to enjoin any use until the circumstances were so changed as to permit authorized use alone.

"Abandonment, waiver, or forfeiture of easement on ground of misuse" is the subject of the appended annotation in 16 ALR2d 609.

Estates — *creation by grant or devise to one and heirs.* The action in Bryant v. Britt, 216 SC 299, 57 SE2d 535, 16 ALR2d 666, was brought for specific performance of a contract to purchase real estate and involved the question whether the plaintiff could convey a fee simple title. The property had been devised, in a will drawn by a layman, to the plaintiff "and her heirs (should she have any) . . . when she becomes twenty-one years of age," followed by a provision for the use of rents and profits until plaintiff became of age. The plaintiff was childless both at the time of the death of the testator and when she became twenty-one years of age, but subsequently gave birth to three children.

A decree directing specific performance was affirmed by the Supreme Court of South Carolina, opinion by Justice Oxner, which held that there was nothing to overcome the presumption that the word "heirs" was used in its technical sense as a word of limitation, under which the plaintiff acquired a fee simple estate.

"Nature of estates or interests created by grant or devise to one and heirs if donee should have any heirs" is the subject of the appended annotation in 16 ALR 2d 670.

Excessive Damages—*personal injuries.* In an automobile accident the plaintiff in Pearson v. Hanna, — Me —, 70 A2d 247, 16 ALR2d 1, had suffered a brain concussion, unconsciousness for a day, numbness, and a brain injury progressive in nature, in addition to loss of blood, a broken nose, and other facial injuries. On appeal from the jury's verdict of $5,000 in the action to recover for such personal injuries, a new trial on the sole ground of the excessiveness of the verdict was overruled by the Supreme Judicial Court of Maine, Per Curiam, which held that the amount awarded was not so disproportionate to the injuries received as to require the verdict to be set aside.

The extensive annotation in 16 ALR2d 3 contains an exhaustive discussion of "Excessiveness of damages in action by person

"Of course you benefit by starting with a small salary . . . you'll get more raises."

injured for personal injuries not resulting in death (for years 1941 to 1950)."

Lease Agreement Memorandum — *sufficiency under statute of frauds.* In 1130 President Street Corp. v. Bolton Realty Corp., 300 NY 63, 89 NE2d 16, 16 ALR2d 617, the plaintiff, exercising an option to lease certain premises of the defendant, sought to compel specific performance by the latter. The agreement granting the option was in a writing which specified the parties, the premises, the term, and the rent, provided for payment by the tenant of taxes and public liability insurance only, and restricted the amount for which the property could be mortgaged. Such customary provisions in long-term leases of commercial property as the right to sublet or assign, the duty to make repairs, and the ultimate disposition of improvements made by the tenant, were omitted. The agreement also provided for a lease "in form satisfactory to the tenant."

A dismissal of the complaint was reversed by the Court of Appeals of New York. The opinion by Justice Bromley held that the writing contained all the terms essential to the relationship of landlord and tenant, contained no indication that other provisions were to be negotiated, and, in the absence of an attempt to prove that the written contract did not set forth the complete agreement of the parties, satisfied the statute of frauds.

"Sufficiency of memorandum of lease agreement to satisfy the statute of frauds, as regards terms and conditions of lease" is the subject of the appended annotation in 16 ALR2d 621.

Motor Vehicle Registration — *vehicle based in other state.* The defendant in State v. Garford Trucking, 4 NJ 346, 72 A2d 851, 16 ALR2d 1407, a prosecution for operation of an unregistered motor vehicle on a public highway, was a corporation organized and existing under local laws, having its principal office or place of business therein, but doing a huge interstate common carrier trucking business and maintaining branch trucking bases in other states where many of its trucks were based and licensed under the laws of such states. The truck herein involved was so based and licensed and was being operated on a through trip from one foreign state to another. A statute peremptorily commanded that, except as thereinafter provided, every resident of the state and every nonresident shall be subject to the rule of registration. Immunity from such obligation of registration was, by a subsequent reciprocity provision, granted under specified circumstances as to a motor vehicle "belonging to a nonresident" and registered in accordance with the laws of the state

or sovereignty "in which the nonresident resides."

A judgment of conviction was sustained by the Supreme Court of New Jersey, in an opinion by Justice Heher. It was held that the defendant was not a "nonresident" within the meaning of the above-mentioned exemption provision, and that requiring it to secure a license for local operation of a truck based and licensed in another state, where it did considerable business, was not a violation of the commerce, due process, or equal protection clauses of the Federal or state constitutions.

The "Applicability of motor vehicle registration laws to corporation domiciled in state but having branch trucking bases in other states" is discussed in the appended annotation in 16 ALR 2d 1414.

Motor Vehicles — *liability for loss by fire.* The loss by fire of an automobile which had been left with the defendant for repairs to its gasoline line and tank was alleged by the petition in Travelers Insurance Co. v. Hulme, 168 Kan 483, 213 P2d 645, 16 ALR2d 793. The automobile and the garage at which it was being repaired and the tools and equipment used to repair it were at all times under the exclusive jurisdiction and control of defendant. It was further alleged that while the defendant was draining the gasoline out of the gas tank and line into an open container inside his garage, a fire broke out which destroyed the automobile, and that defendant's negligent operation of his garage and negligence in repairing the automobile caused plaintiff's loss.

The opinion of Justice Arn of the Kansas Supreme Court held that the facts thus alleged were sufficient to invoke the application of the doctrine of res ipsa loquitur, and hence specific acts of negligence need not be alleged; and that the general demurrer to the petition was properly overruled.

The "Liability of garagemen, service or repair station, or filling station operator for destruction or damage of motor vehicle by fire" is discussed in the appended annotation in 16 ALR2d 799.

Muddy Sidewalk — *municipal liability.* Consolidated actions were brought against defendant city in Hood v. Allen, 190 Tenn 56, 227 SW2d 534, 16 ALR2d 1286, by plaintiff wife to recover damages for an injury caused by slipping on a muddy sidewalk and by plaintiff husband for medical expenses and loss of services. The mud on the sidewalk resulted from rain after the completion of excavation operations by the city. It appeared that pedestrians could have avoided the slippery place by walking outside or around it.

Judgments entered on verdicts for the plaintiffs were reversed by the Supreme Court of Tennessee, in an opinion by Justice

Prewitt, which held that an injury to a pedestrian exercising reasonable care could not be foreseen or anticipated by the city which was not guilty of negligence.

The appended annotation in 16 ALR2d 1290 discusses the liability of a municipal corporation to a pedestrian for injuries resulting from the slippery condition of a sidewalk caused by deposits of earth or mud thereon.

Parked Motor Vehicle — *injury by.* A plaintiff who was injured when struck by defendant's runaway automobile which had been parked by defendant on a steep hill brought an action in Lewis v. Wolk, 312 Ky 536, 228 SW2d 432, 16 ALR2d 97[illegible] to recover damages for the injury. The defendant testified with the corroboration of a companion, that he had applied the emergency brake and had turned the front wheels toward the curb.

A judgment rendered on a verdict directed for the defendant was reversed by the Court of Appeals of Kentucky. The opinion by Commissioner Clay, reviewing the essential elements, operation, and effect of the doctrine of res ipsa loquitur, held the principal case to be a proper one for its application so as to cast upon defendant the burden of showing some cause for the injury beyond his con-

" 'Summons', it says. Probably just some silly advertising circular!"

trol and preclude the direction of a verdict in his favor in the absence of such proof as would conclusively rebut the presumption raised.

The appended annotation in 16 ALR2d 979 is concerned with the factual situation where personal injury or property damage is caused by a parked automobile which starts up and moves from its parking place without the driver or any third person having interfered with its propelling mechanism.

Public Amusement — *liability for injury to patron.* An action to recover damages for personal injuries was brought against a baseball club in Hughes v. St. Louis National League Baseball Club, 359 Mo 993, 224 SW2d 989, 16 ALR2d 904, by a patron whose arm was broken by rough play of youthful cushion pickers, while leaving the stands through an area where such youths, brought in every day to serve the operator's purpose, were required to assemble and remain without organization, regulation, or supervision. There was evidence that the manager of the defendant's cushion department had, on previous occasions, observed rough play by the boys and had found it necessary to warn them.

The Supreme Court of Missouri, in an opinion by Chief Justice Hyde, distinguishing occasional attendance of various groups of boys from observed improper conduct of a regular group brought in every day by the operator to serve his own purpose, held that the evidence was sufficient to submit the case to the jury and preclude a directed verdict for the defendant. It was held, however, that it was erroneous to base an instruction to the jury on the premise that, regardless of any knowledge of previous conduct of the boys involved, it could reasonably be anticipated that assembling any group of boys at such a time and place would create a dangerous situation for the results of which defendant would be liable.

An exhaustive discussion of "Liability to patron of public amusement for accidental injury from cause other than assault, hazards of game or amusement, or condition of premises" is contained in the appended annotation in 16 ALR2d 912.

Safety Appliance Acts — *equipment failure as actionable wrong.* In O'Donnell v. Elgin, Joliet & Eastern Railway Co., 338 US 384, 94 L ed 187, 70 S Ct 200, 16 ALR2d 646, a railroad employee met an unwitnessed death at the defendant railroad's yard near cars which he was going to adjust when last seen, and with which other cars collided, after having broken loose, as the result of the breaking of a coupler, from a cut of cars that was being moved in a switching operation.

Four of the Justices of the United States Supreme Court, in an opinion by Justice Jackson,

held that it was error for the trial court to refuse instructions requested by plaintiff upon the theory that a breaking of the coupler in and of itself was negligence per se.

Justices Burton and Reed dissented on the ground that the Safety Appliance Acts do not contain a mandatory requirement which would make the railroad an insurer of the safety of the appliances used.

The appended annotation in 16 ALR2d 654 discusses "Failure of equipment required by Federal Safety Appliance Acts as constituting actionable wrong."

Sale by infant — *avoidance of.* A minor who had sold his automobile sought to disaffirm the sale and brought an action, by his next friend, in Jones v. Caldwell, 216 Ark 260, 225 SW2d 323, 16 ALR2d 1416, to recover possession thereof from third persons who had purchased the same. A judgment for the plaintiff was reversed by the Supreme Court of Arkansas, in an opinion by Justice Dunaway. It was held that the provision of the Uniform Sales Act that "where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title," applies to the sale of goods by one whose title is subject to avoidance by a minor, the common-law rule as to which was regarded as changed by the quoted provision.

The appended annotation in 16 ALR2d 1420 discusses the question of the right of an infant, who has disaffirmed, as against an immediate purchaser from him, his contract of sale of his personal property, to recover back such property from one who has acquired it for value, without notice of the infancy of the original seller.

Subrogation — *waiver of insurer's right to.* In Powers v. Calvert Fire Insurance Co., 216 SC 309, 57 SE2d 638, 16 ALR2d 1261, the action was brought by an insured against the insurer for damages for breach of a policy of automobile insurance against loss by collision. The insurer, notwithstanding due notice of the loss and of the need of the insured for a replacement vehicle for business and family purposes, failed to fulfil its undoubted liability under the policy. Severe personal injuries were also suffered by the insured in the accident to collect damages for which he brought an action against the owner of the other automobile involved in the collision, in which action the claim for loss of the insured's automobile was included to prevent loss of the claim under the rule of law requiring claims for property damage and personal injuries to be included in one action. The action was finally terminated by settlement of all claims and release of the third

party by the insured. The insurer kept close contact with the progress of the action and settlement, but took no part therein despite its rights under a subrogation clause of the policy, which also provided that the "insured shall do nothing after loss to prejudice such rights."

Judgment on a verdict for the plaintiff insured was affirmed by the Supreme Court of South Carolina, in an opinion by Justice Stukes, which held that the action of the defendant insurer, in seeking to take advantage of the insured's position, constituted a waiver of its subrogation rights.

The "Waiver by insurance company of right to subrogation" is discussed in the appended annotation in 16 ALR2d 126

Substituted Parties — appeal *ability of order as to.* An actio to restrain designated municipa officers from making payment of the salary of an office allege to be vacant was, in Phillips v Brandt, — Minn —, 43 NW2 285, 16 ALR2d 1048, brought by a resident taxpayer of the city on behalf of all other taxpayers. After trial and order for judgment in favor of plaintiff, but before entry of judgment pursuant thereto, the named plaintiff became disqualified by permanent departure from the city and the term of one of the defendant officers expired.

Orders denying motions for

"Am I dictating too fast for you, Miss Blake?"

substitution of the successor public officer as a party defendant, and of two persons as parties plaintiff who at all material times were property owners and taxpayers of the city, were reversed by the Supreme Court of Minnesota. The opinion by Justice Thomas Gallagher held that the order denying the substitution of appellants as parties plaintiff was appealable under a statute authorizing an appeal "from an order which, in effect, determines the action, and prevents a judgment from which as appeal might be taken"; that the plaintiff taxpayer was so affected by the illegal expenditures as to authorize a representative action by him on behalf of all other taxpayers; that the trial court, upon disqualification of the original plaintiff, had inherent discretionary power to substitute one of those on whose behalf the action was instituted; that a reversal of the judgment because of the court's refusal to make the substitution in the erroneous belief that it did not possess the power was not an appellate interference with the exercise of a discretionary power; and that, the public duty involved in the action being a continuing one pertaining to the office, the successor officer may and should be substituted as party defendant.

The appended annotation in 16 ALR2d 1057 is concerned with the question as to whether an order granting or denying substitution of parties is appealable, excluding, however, situations in which the question of substitution arises upon death of one of the original parties.

Case and Comment
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Swinging Door — *personal injury from.* In the action brought against a bank in Young v. Bank of America National Trust and Savings Association, 95 Cal App 2d 725, 214 P2d 106, 16 ALR2d 1155, to recover damages for personal injuries to an infant, the evidence was uncontradicted that the plaintiff, accompanying her mother on a business visit to the bank, was injured by a heavy swinging door on the premises; that a door check, which, if in proper order, would have prevented the door from swinging beyond the closed position, was out of order; that a previous similar injury by the same door was known to defendant's mana-

ger, who passed through the door daily for several years; and that the door check was not repaired.

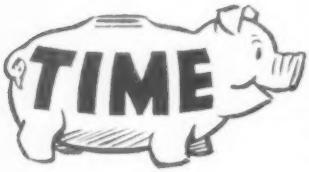
A judgment of nonsuit was reversed by the District Court of Appeal, Second District, Division 2. The opinion, by Justice Wilson, held that the jury would have been justified by the evidence in finding that the plaintiff's injury was caused by the dangerous and defective condition of the swinging door, that the defendant had notice of such condition for a period sufficient to have had the defect remedied, and that the nonsuit therefore wrongfully deprived the plaintiff of her right to have the jury determine whether her injury was caused by the defendant's failure to exercise the degree of care due its invitees and business visitors.

An exhaustive discussion of "Liability for injury resulting from swinging door" is contained in the appended annotation in 16 ALR2d 1161.

Taft-Hartley Act — *secondary boycott.* The National Labor Relations Board petitioned in National Labor Relations Board v. Wine, Liquor & Distillery Workers Union, 178 F2d 584, 16 ALR2d 762, for enforcement of its order against the respondent labor union to cease inducing its members to engage in a secondary boycott in violation of the Taft-Hartley Act. The union represented employees of distributors of alcoholic beverages who dealt principally in the product of a producer whose employees were on strike, but who had no other relationship therewith either in ownership or in management.

The Second Circuit, in an opinion by Circuit Judge Augustus N. Hand decreeing enforcement of the order of the National Labor Relations Board, held that the finding of the Board that an object of the work stoppage was to exert pressure on the third party to induce it to agree to terms with its employees had ample support in the evidence; that such work stoppage was not rendered lawful by additional objects, or by the trade relationship of the producer and distributors; that secondary boycotts forbidden by the act were not confined to such as were unlawful at common law or under the law of some particular state; and that the statutory provision against secondary boycotts violated neither the First, Fifth, nor Thirteenth Amendment of the United States Constitution.

The appended annotation in 16 ALR2d 769 discusses "Constitutionality and construction of provision of Labor Management Relations Act (Taft-Hartley Act) making it unfair labor practice for labor organization to engage in secondary boycott."



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